Supreme Court, U. S.
FILED
DEC 2 1978
MICHAEL RODAK, JR., CLERK

No. 78-571

# In the Supreme Court of the United States

OCTOBER TERM, 1978

GERALD L. BLUCHER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

No. 78-571

GERALD L. BLUCHER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES

---

### QUESTION PRESENTED

Whether petitioner could properly be prosecuted in a federal district court in Wyoming on charges of having mailed obscene materials from Oregon to a postal inspector in Wyoming who ordered them under a fictitious name, notwithstanding that petitioner had never engaged in the obscenity business in Wyoming.

### STATEMENT

Petitioner was indicted on 20 counts of mailing obscene materials from Oregon to a postal inspector, posing as a civilian purchaser, in Wyoming, in violation of 18 U.S.C. 1461. Prior to trial, petitioner moved to dismiss the indictment on the ground that he had never done business with anyone in Wyoming other than the postal inspector and that the government, therefore, had improperly "forum shopp[ed]" for a favorable community in which to try him. The motion was denied without an evidentiary

hearing (H. Tr. 42-47).[1] After preserving his right to appeal, petitioner pleaded guilty to one count of mailing an obscene film, "Sweden HP-11" (Tr. 6, 11).[2] Pursuant to a plea agreement, the remaining 19 counts were dismissed (Tr. 12). Imposition of sentence was suspended and petitioner was placed on three years' probation, subject to the condition that he neither possess obscene materials nor engage in distributing or selling them (Tr. 17). The court of appeals affirmed (Pet. App. 2-6).

## DISCUSSION

Petitioner contends (Pet. 7) that his prosecution in Wyoming on charges of having mailed obscene materials from Oregon to a Wyoming postal inspector, who ordered them under an assumed name, constitutes a type of forum shopping that takes the case beyond the "range" of 18 U.S.C. 3237(a), the venue provision governing offenses under the obscenity statute, 18 U.S.C. 1461. He further contends (Pet. 7-9) that his prosecution under these circumstances is inconsistent with the local "community standards" test set out in *Hamling* v. *United States*, 418 U.S. 87 (1974), and violates his Sixth Amendment right to a trial at the place the crime was committed. As we explain below, we believe these contentions are legally unsound; but we have concluded, nevertheless, that petitioner's prosecution for mailing obscene materials to the Wyoming postal inspector violates policies that the Department of Justice is obligated to follow in the light of a commitment made by the Executive Branch to Congress with regard to choice of venue for prosecution of Section 1461 violations.

---

[1]"H. Tr." refers to the transcript of the motions proceedings, dated December 2, 1976.

[2]"Tr." refers to the transcript of the change of plea and sentencing, dated December 3, 1976.



1. The express terms of 18 U.S.C. 1461 (Pet. App. 7-8) and of 18 U.S.C. 3237(a) (Pet. 3-4), and the legislative history of Section 1461 with respect to its relationship to Section 3237(a), make it plain that Congress intended to permit the government to prosecute violators of Section 1461 in the district *to* which they mail obscene materials, as well as in the district *from* which they mail such materials. Moreover, as the pertinent legislative history makes clear, such prosecutions are permitted even where the government makes its choice of venue with an eye to successful prosecution of the offense.[3]

In 1958, Congress amended Section 1461, changing its provision prescribing penalties for "[w]hoever knowingly deposits for mailing or delivery" obscene materials to a provision prescribing penalties for "whoever knowingly uses the mails" to deliver obscene materials. Pub. L. No. 85-796, Section 1, 72 Stat. 962. The purpose of the amendment was to make the mailing of obscene matter in violation of Section 1461 a continuing offense under Section 3237(a), thereby permitting prosecution "not only at the place at which the objectionable matter is mailed, but also at the place of

---

[3]Petitioner has mistakenly couched his claim in terms of lack of "jurisdiction"; the issue is one of venue. See *Travis* v. *United States*, 364 U.S. 631, 633 (1961); *United States* v. *Johnson*, 323 U.S. 273, 275-276 (1944). By failing to request a change of venue (petitioner moved instead to dismiss the indictment), he waived his right to challenge venue in the District of Wyoming. *United States* v. *Semel*, 347 F. 2d 228, 229 (4th Cir.), cert. denied, 382 U.S. 840 (1965). (Had petitioner moved for a change of venue "in the interest of justice" under Rule 21(b), Fed. R. Crim. P., the court's proper course would have been to deny it. See *United States* v. *McManus*, 535 F. 2d 460, 466 (8th Cir. 1976)). We note, however, that the district judge spoke of his ruling on petitioner's motion to dismiss the indictment as a holding that "the Court does have jurisdiction," and that he advised petitioner, before entry of the guilty plea, that petitioner could raise the issue "with a higher tribunal" (Tr. 7).

address or delivery, or in any judicial district through which such mail is carried." H.R. Rep. No. 1614, 85th Cong., 2d Sess. 2 (1958). See also 104 Cong. Rec. 8991-8992 (1958).[4]

In enacting this amendment, Congress was responding in part to a concern that limiting prosecutions to the district from which obscene materials were mailed was an inadequate means of dealing with the mail order problem because most such materials were mailed from large cities like Los Angeles and New York, where obscenity convictions were difficult to obtain. 104 Cong. Rec. 8992 (1958) (remarks of Rep. Reuss). See also Lockhart and McClure, *Censorship of Obscenity: The Development of Constitutional Standards,* 45 Minn. L. Rev. 5, 36-37 (1960). The House bill, H.R. 6239, 85th Cong., 2d Sess. (1958), which was essentially the same as the amendment to Section 1461 that was finally passed, was questioned in the Senate because of what was deemed a potential for arbitrary forum shopping. The Senate's concern focused on the selection of districts *through* which obscene mail might pass after leaving the district of deposit and before reaching the district of its intended destination. S. Rep. No. 1839, 85th Cong., 2d Sess. 2 (1958). The issue went to conference, and after receiving assurances from the Post Office Department that it did not intend to press for prosecution in intervening districts, the Senate agreed to the House version. H.R. Rep. No. 2624, 85th Cong., 2d Sess. 4 (1958).

---

[4]The amendment was prompted by an interpretation of 18 U.S.C. 1461 by the court of appeals in *United States* v. *Ross*, 205 F. 2d 619 (10th Cir. 1953), limiting venue in obscenity cases to the district of deposit. H.R. Rep. No. 1614, 85th Cong., 2d Sess. 3-5 (1958); S. Rep. No. 1839, 85th Cong., 2d Sess. 2-3 (1958). See Comment, *Venue: Its Impact on Obscenity*, 11 S.D. L. Rev. 363 (1966).



The upshot is that the present prosecution in the district in which obscene materials were received is within the reach of Sections 1461 and 3237(a). Nor does that result offend the Constitution. In *Hamling* v. *United States, supra,* 418 U.S. at 106, the Court found no constitutional impediment to subjecting pornography distributors to prosecution in the "various federal judicial districts into which they transmit [obscene] materials * * *." Had petitioner wished to avoid prosecution in Wyoming, he could have declined to send his materials there. See *United States* v. *Slepicoff,* 524 F. 2d 1244, 1249 (5th Cir. 1975), cert. denied, 425 U.S. 998 (1976). See also *United States* v. *Various Articles of Obscene Merchandise,* 562 F. 2d 185 (2d Cir. 1977), cert. denied, No. 77-1226 (June 30, 1978). And contrary to petitioner's suggestion, the fact that the material in question had been ordered by a postal inspector using a fictitious name affords him no defense to prosecution. Since petitioner has never alleged that he lacked a predisposition to commit the offense, he can make no colorable claim of entrapment. See *United States* v. *Russell,* 411 U.S. 423, 429-433 (1973). Moreover, the Court has long sanctioned the government's use, in pornography investigations, of postal inspectors who order materials through the mail from suspected purveyors of obscene materials. The mere fact that material was ordered by a government agent is no defense to an obscenity charge. *United States* v. *Reidel,* 402 U.S. 351 (1971); *Grimm* v. *United States,* 156 U.S. 604, 610 (1895); *Rosen* v. *United States,* 161 U.S. 29, 42 (1896).

2. Nevertheless, as we have indicated, we believe the judgment of conviction should be vacated, and the indictment dismissed, because the prosecution is inconsistent with the policy of the Executive Branch.

As noted above, the Senate agreed to the language of the section under which petitioner was prosecuted only on an assurance that the Post Office would not press for prosecution of violations in districts through which the material alleged as obscene had passed, on its way from the district of deposit to the district of receipt. Although that assurance does not literally cover prosecutions in districts to which a pornography distributor sends material *only* in response to the request of a government agent acting under a fictitious name, the Department of Justice is of the view that, in some circumstances, such prosecutions probably represent "unrestricted 'forum shopping' " similar in character to the type about which the Senate expressed concern. S. Rep. No. 1839, *supra,* at 3. Accordingly, it is the policy of the Department not to prosecute a pornography distributor under 18 U.S.C. 1461 in any district to which he has mailed material in response to a request from a government agent acting in an investigative capacity, so long as the Department has no information that the distributor has had any other contacts with that district relating to his pornography enterprise.

There was no indication here that, before the mailings for which he was indicted occurred, petitioner had ever mailed any obscene materials to Wyoming residents or solicited any business there. Apart from the dealings initiated by the Wyoming postal inspector, petitioner's business activity involving such materials appears to have been conducted entirely outside the district in which he was prosecuted. His prosecution thus violates the policy of the Department of Justice. Accordingly, we ask the Court to vacate the judgment of the court of appeals and remand the case to the district court with directions to vacate its judgment and dismiss the indictment. This is the procedure previously followed by the Court in similar cases. See *Petite* v. *United States,* 361 U.S. 529 (1960); *Margraf* v. *United States,* 414 U.S. 1106 (1973); *Redmond* v. *United States,* 384 U.S. 264 (1966); *Marakar* v. *United States,* 370 U.S. 723 (1962).



## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the district court with directions to vacate its judgment and dismiss the indictment.

WADE H. MCCREE, JR.
*Solicitor General*

DECEMBER 1978

DOJ-1978-11